



TABLE OF CONTENTS

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

ASSIGNMENTS OF ERROR ..... 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 2

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 3

ARGUMENT ..... 6

I.     **The prosecutor violated Mr. Bell’s Fifth and Fourteenth Amendment right to remain silent by eliciting testimony that he’d exercised his *Miranda* rights.**..... 6

II.    **Mr. Bell was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.** 9

A.     Defense counsel was ineffective for failing to object to the prosecutor’s misconduct, for emphasizing Mr. Bell’s post-*Miranda* silence, and for failing to request an instruction limiting the jury’s consideration of the improperly admitted evidence..... 11

B.     Defense counsel was ineffective for failing to object to the admission of Mr. Bell’s prior felony convictions under ER 609(a)(1). ..... 12

III.   **The SRA, as amended in 2008, violates the Fifth and Fourteenth Amendment right to due process and privilege against self-incrimination by shifting the burden of proof at sentencing.**..... 14

CONCLUSION ..... 17

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Estelle v. Smith</i> , 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) ..	14
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)	9
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	2, 6, 7, 8, 11, 12, 14
<i>Mitchell v. United States</i> , 526 U.S. 314, 325, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999).....	14
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	10
<i>United States v. Salemo</i> , 61 F.3d 214 (3 <sup>rd</sup> Cir. 1995) .....	9

### WASHINGTON CASES

<i>In re Detention of Post</i> , 145 Wn.App. 728, 187 P.3d 803 (2008) .....	14
<i>In re Fleming</i> , 142 Wn.2d 853, 16 P.3d 610 (2001).....	10
<i>In re Hubert</i> , 138 Wn. App. 924, 158 P.3d 1282 (2007).....	10
<i>State v. Boehning</i> , 127 Wn. App. 511, 111 P. 3d 899 (2005).....	6
<i>State v. Burke</i> , 163 Wn.2d 204, 181 P.3d 1 (2008).....	7
<i>State v. Flores</i> , 164 Wn.2d 1, 186 P.3d 1038 (2008).....	7, 9
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	15, 16, 17
<i>State v. Gregory</i> , 158 Wn.2d 759, 147 P.3d 1201 (2006) .....	6
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	10
<i>State v. Holmes</i> , 122 Wn.App. 438, 93 P.3d 212 (2004).....	7
<i>State v. Horton</i> , 136 Wn. App. 29, 146 P.3d 1227 (2006).....	10

<i>State v. Jones</i> , 71 Wn.App. 798, 863 P.2d 85 (1993).....	6
<i>State v. Knapp</i> , 148 Wn.App. 414, 199 P.3d 505 (2009).....	7, 8, 9
<i>State v. MacDonald</i> , 122 Wn. App. 804, 95 P.3d 1248 (2004).....	7
<i>State v. Mendoza</i> , 165 Wn.2d 913, 205 P.3d 113 (2009) .....	16
<i>State v. Pittman</i> , 134 Wn. App. 376, 166 P.3d 720 (2006).....	10
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004) .....	10, 12, 14
<i>State v. Romero</i> , 113 Wn.App. 779, 54 P.3d 1255 (2002).....	7, 8
<i>State v. Walsh</i> , 143 Wn.2d 1, 17 P.3d 591 (2001).....	6
<i>State v. WWJ Corp.</i> , 138 Wn.2d 595, 980 P.2d 1257 (1999) .....	6

**CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. V .....	1, 2, 6, 7, 8, 14, 16
U.S. Const. Amend. XIV .....	1, 2, 6, 7, 8, 9, 14, 16
U.S. Const. VI.....	1, 2, 9
Wash. Const. Article I, Section 22.....	9

**WASHINGTON STATUTES**

RCW 9.94A.500.....	15, 16
RCW 9.94A.530.....	15, 16

**OTHER AUTHORITIES**

ER 609 .....	12, 13
Laws of 2008, Chapter 231, Section 2.....	15
RAP 2.5.....	6

### ASSIGNMENTS OF ERROR

1. The prosecuting attorney committed misconduct requiring reversal.
2. The prosecuting attorney unconstitutionally commented on Mr. Bell's exercise of his Fifth and Fourteenth Amendment right to remain silent.
3. The prosecuting attorney committed misconduct by bringing out evidence that Mr. Bell exercised his right to remain silent.
4. Mr. Bell was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
5. Defense counsel was ineffective by failing to object to the prosecutor's misconduct.
6. Defense counsel was ineffective when he had the officer repeat his testimony that Mr. Bell exercised his right to remain silent.
7. Defense counsel was ineffective when he failed to seek a limiting instruction prohibiting the jury from considering Mr. Bell's exercise of his right to remain silent as substantive evidence of guilt.
8. Defense counsel was ineffective for highlighting Mr. Bell's exercise of his right to remain silent during closing arguments.
9. The trial court failed to properly determine Mr. Bell's criminal history and offender score.
10. The trial court erred by sentencing Mr. Bell with an offender score of 8 on the theft charge.
11. The trial court erred by sentencing Mr. Bell with an offender score of 12 on the hit-and-run charge.
12. The trial court erred by adopting Finding 2.2 of the Judgment and Sentence, which purported to list Mr. Bell's criminal history.
13. The 2008 amendments to the SRA violate an offender's Fifth and Fourteenth Amendment right to due process and privilege against self-incrimination by shifting the burden of proof at sentencing.

## ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The state may not comment on an accused person's exercise of the constitutional right to remain silent. Here, the prosecutor elicited testimony that Mr. Bell chose to remain silent after receiving *Miranda* warnings. Did the prosecutor unconstitutionally comment on Mr. Bell's exercise of his Fifth and Fourteenth Amendment privilege against self-incrimination?
2. An accused person has a constitutional right to the effective assistance of counsel. Defense counsel failed to object to the prosecutor's misconduct, re-emphasized Mr. Bell's exercise of his right to remain silent (on cross-examination and during closing), and did not request a limiting instruction prohibiting the jury from considering this evidence as substantive evidence of guilt. Was Mr. Bell denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
3. An accused person may be impeached with prior felony convictions that are not crimes of dishonesty, but only if the probative value of the evidence outweighs the prejudicial effect. Defense counsel did not object when the prosecutor impeached Mr. Bell with two felony convictions that were not crimes of dishonesty. Was Mr. Bell denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
4. Under the Fifth and Fourteenth Amendments, an offender has a constitutional right to remain silent pending sentencing, and the state is constitutionally required to prove criminal history by a preponderance of the evidence. The 2008 amendments to the SRA permit the court to use a prosecutor's bare assertions as prima facie evidence of criminal history, and allow the court to draw adverse inferences from the offender's silence pending sentencing. Do the 2008 amendments to the SRA violate an offender's Fifth and Fourteenth Amendment right to due process and privilege against self-incrimination?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Jeremiah Bell was walking home from his sister's home when he was tackled and arrested. RP (7/13/09) 75-77. A car had been stolen and involved in an accident, and the police decided that Mr. Bell was the culprit. RP (7/13/09) 15, 45-46, 65. None of the people who saw the event – not the car owner, nor his coworker (who gave chase), nor the woman who saw the accident out her living room window, nor the woman whose car was hit by the fleeing vehicle – saw the face of the man who stole the car and fled the accident scene. RP (7/13/09) 15, 19, 26, 30, 41, 70-71.

The police arrested Mr. Bell because his clothing—a brown Carhart-type jacket and jeans—matched one witness's description, and because he was on foot in the area. RP (7/13/09) 45-46. Mr. Bell was out of breath after the officers tased him, and according to the arresting officer, he was sweaty and dirty. RP (7/13/09) 47, 57. Mr. Bell was handcuffed and seated in the back seat of a patrol car. The woman who witnessed the accident from her window viewed him in the patrol car after the arrest, and said that he was wearing the same clothing as the man who had jumped out of the stolen car after the crash. RP (7/13/09) 38-39, 41.

Mr. Bell was wearing a hat when he was arrested, but the woman's description didn't include a hat. RP (7/13/09) 37-42, 46, 70.

The state charged Mr. Bell with Theft of a Motor Vehicle and Hit and Run/Injury. CP 2.

After the state presented its case, Mr. Bell testified. RP (7/13/09) 74-80. He said that after been doing yard work for his sister he couldn't find a ride home, and so started to walk. RP (7/13/09) 75-76. He said as he was cutting through someone's yard, he was arrested. RP (7/13/09) 76-77. Mr. Bell testified that he had told the arresting officer that he was just walking home from his sister's home, and that he saw a car go by very fast. RP (7/13/09) 79. After impeaching Mr. Bell with a prior forgery conviction, the prosecutor asked about two unnamed felony convictions. Defense counsel did not object. RP (7/13/09) 79.

In its rebuttal case, the state recalled the arresting officer. He told the jury that he read Mr. Bell his *Miranda* rights, and that Mr. Bell did not say he'd been walking home from his sister's, that he'd seen a car go by, or that he'd been doing yard work. RP (7/13/09) 81. On cross-examination, defense counsel brought out that Mr. Bell said nothing after he had been read his rights. RP (7/13/09) 83. Defense counsel did not propose, and the court did not give, any instruction limiting the jury's consideration of Mr. Bell's exercise of his right to remain silent.

Defendant's Proposed Instructions (2 sets), Court's Instructions to the Jury, Supp. CP.

During closing argument, defense counsel brought up Mr. Bell's post-*Miranda* silence, and urged the jury not to hold his silence against him. RP (7/14/09) 118. The prosecutor responded that Mr. Bell said nothing to the officer about being at his sister's, and that no evidence corroborated Mr. Bell's version of events. RP (7/14/09) 124-125. The prosecutor also reminded the jury that Mr. Bell had criminal history. RP (7/14/09) 122.

The jury convicted Mr. Bell of both counts. RP (7/14/09) 130-132. At sentencing, the state filed a Statement of Criminal History. Prosecutor's Statement of Criminal History, Supp. CP. Apparently based on this document, and without any discussion on the record, the court found that Mr. Bell had 8 points on his theft charge, and 12 points for the hit-and-run charge. CP 12. Mr. Bell was sentenced, and he timely appealed. CP 17-27, 3-14.

## ARGUMENT

### **I. THE PROSECUTOR VIOLATED MR. BELL'S FIFTH AND FOURTEENTH AMENDMENT RIGHT TO REMAIN SILENT BY ELICITING TESTIMONY THAT HE'D EXERCISED HIS *MIRANDA* RIGHTS.**

A prosecuting attorney is a quasi-judicial officer, charged with the duty of ensuring that an accused receives a fair trial. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P. 3d 899 (2005). Prosecutorial misconduct requires reversal whenever the prosecutor's improper actions prejudice the accused person's right to a fair trial. *Boehning*, at 518.

Misconduct may be raised for the first time on appeal when it amounts to a manifest error affecting a constitutional right.<sup>1</sup> RAP 2.5(a); *State v. Jones*, 71 Wn.App. 798, 809-810, 863 P.2d 85 (1993). A reviewing court "previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).<sup>2</sup>

Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed. *State v. Flores*, 164 Wn.2d 1, 25, 186 P.3d 1038

---

<sup>1</sup> *But see also State v. Gregory*, 158 Wn.2d 759, 808 n. 24, 147 P.3d 1201 (2006) ("There has been some disagreement as to the impact of a failure to object at trial upon a claim on appeal that a prosecutor's argument amounted to an improper comment on a constitutional right.")

<sup>2</sup> The policy is designed to prevent appellate courts from wasting "judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits." *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

(2008). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Flores*, at 25. The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

An accused person has a constitutional privilege against self-incrimination.<sup>3</sup> U.S. Const. Amend. V; *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). A prosecutor's comment on an accused person's right to remain silent violates the Fifth Amendment. *State v. Holmes*, 122 Wn.App. 438, 445, 93 P.3d 212 (2004); *State v. MacDonald*, 122 Wn. App. 804, 812, 95 P.3d 1248 (2004). A prosecutor comments on the constitutional right to remain silent by eliciting testimony that the accused person chose to remain silent after receiving *Miranda* warnings. *See, e.g., State v. Knapp*, 148 Wn.App. 414, 422, 199 P.3d 505 (2009) (citing *State v. Romero*, 113 Wn.App. 779, 54 P.3d 1255 (2002)).

---

<sup>3</sup> The Fifth Amendment is applicable to the states through the Fourteenth Amendment's due process clause. U.S. Const. Amend. XIV; *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

In this case, the prosecutor commented on Mr. Bell's exercise of his constitutional privilege against self-incrimination by eliciting testimony that Mr. Bell chose to remain silent after receiving *Miranda* warnings. RP (7/13/09) 65, 81-82. This violated Mr. Bell's Fifth and Fourteenth Amendment rights.<sup>4</sup> *Knapp, supra; Romero, supra*. The prosecutor could have properly impeached Mr. Bell's testimony (that he'd explained his presence and appearance to the police) by asking the officer if Mr. Bell had offered an explanation; however, instead, the prosecutor focused on the fact that Mr. Bell was informed of his rights and didn't say anything.<sup>5</sup>

The misconduct was prejudicial, because a reasonable jury could have acquitted Mr. Bell, and because the evidence was not so overwhelming that it necessarily established his guilt: none of the eyewitnesses were able to identify Mr. Bell as the person who had been driving the car. No physical evidence directly linked Mr. Bell to the accident. Although Mr. Bell's clothing resembled the driver's clothing, there was nothing unique about the way he was dressed, and the witness

---

<sup>4</sup> The prosecutor was arguably responding to Mr. Bell's claim that he'd told the officers he was returning from his sister's house; however, Mr. Bell did not testify that he'd made the statement after receiving *Miranda* warnings, and there was no need for the prosecutor to establish that Mr. Bell chose to remain silent after the warnings had been administered.

<sup>5</sup> Mr. Bell did not testify that he'd offered the explanation *after* receiving *Miranda* warnings. RP (7/13/09) 77-78.

who had described the driver's clothing did not mention a hat to the police. Furthermore, Mr. Bell was able to provide an innocent explanation for his presence and his appearance.

Under these circumstances, it cannot be said beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Flores*, at 25. Accordingly, Mr. Bell's convictions must be reversed and his case remanded for a new trial. *Knapp, supra*.

## **II. MR. BELL WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.**

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3<sup>rd</sup> Cir. 1995).

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004), citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also *State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance; however, this presumption is overcome when "there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, at 130. Any trial strategy "must be based on reasoned decision-making..." *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical

decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

- A. Defense counsel was ineffective for failing to object to the prosecutor’s misconduct, for emphasizing Mr. Bell’s post-*Miranda* silence, and for failing to request an instruction limiting the jury’s consideration of the improperly admitted evidence.

Defense counsel should have objected to the testimony that Mr. Bell remained silent after administration of *Miranda* warnings. Instead, defense counsel compounded the problem by bringing out the information a second time (on redirect examination), and then by highlighting Mr. Bell’s post-arrest silence again during closing (by asking the jury not to hold it against his client.). RP (7/13/09) 83; RP (7/14/09) 118. Furthermore, defense counsel did not ask for a limiting or curative instruction restricting the jury’s consideration of the improperly admitted evidence.

Defense counsel’s failure to object to the misconduct (and his subsequent errors compounding the problem) constituted deficient performance. First, an objection to the improper testimony would have been sustained. The prosecutor had no basis to inquire about Mr. Bell’s post-arrest silence (since Mr. Bell had not claimed to give his explanation to the police after receiving *Miranda* warnings). Second, there was no strategic purpose justifying counsel’s conduct. The admission of Mr.

Bell's post-*Miranda* silence did nothing to further the defense theory (that Mr. Bell was not the driver of the car involved in the accident).

Furthermore, counsel's errors prejudiced Mr. Bell. By highlighting Mr. Bell's post-*Miranda* decision to remain silent, the prosecutor and defense counsel suggested to the jury that Mr. Bell exercised his rights because he had something to hide. Counsel's failure to request a limiting instruction and his return to the issue during closing arguments ensured that Mr. Bell's post-*Miranda* silence would be on the jurors minds, and available to them as substantive evidence of guilt.

There is a reasonable possibility that the outcome of the proceeding would have differed if the jury had not been permitted to consider Mr. Bell's post-*Miranda* silence as evidence of guilt. Accordingly, his convictions must be reversed and the case remanded for a new trial. *Reichenbach, supra*.

B. Defense counsel was ineffective for failing to object to the admission of Mr. Bell's prior felony convictions under ER 609(a)(1).

ER 609(a) permits impeachment with a prior conviction, but only if "the crime (1) was punishable by death or imprisonment in excess of 1 year..., and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the

punishment.” ER 609(a). Here, after properly impeaching Mr. Bell with his forgery conviction, the prosecutor asked if he’d been “convicted of two other felonies back in 2004 as well.” RP (7/13/09) 79. These two other felonies (according to the prosecutor’s statement of criminal history) were Possession of Methamphetamine with Intent to Deliver and Unlawful Possession of a Firearm in the First Degree. Prosecutor’s Statement of Criminal History, Supp. CP. Neither conviction involved a crime of dishonesty.

Because the two prior felonies fell under ER 609(a)(1), defense counsel should have objected and asked the court to weigh probative value against prejudice as required by the rule. Counsel’s failure to object constituted deficient performance. First, an objection would likely have been sustained. The two prior convictions had minimal probative value on the issue of Mr. Bell’s credibility, since they were not crimes of dishonesty. They were highly prejudicial, since the introduction of these prior convictions suggested to the jury that Mr. Bell was a career criminal with a propensity to commit felonies, who could not be trusted to give honest testimony.

Mr. Bell’s strategy rested on his testimony that he was not the driver of the vehicle. His credibility was critical to this defense, and had already been partially undermined by his forgery conviction, by the

evidence contradicting Mr. Bell's statement (that he'd explained his presence and appearance to the police at the scene), and by the improperly admitted testimony that he'd chosen to exercise his *Miranda* rights.

Evidence that he'd also been convicted of two prior felonies may well have tipped the balance against him and changed the outcome of the trial.

There is a reasonable possibility that Mr. Bell would have been acquitted (or that the jury would have been unable to reach a verdict) had defense counsel objected to the improper impeachment. Because of this, his convictions must be reversed and the case remanded for a new trial.

*Reichenbach, supra.*

**III. THE SRA, AS AMENDED IN 2008, VIOLATES THE FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND PRIVILEGE AGAINST SELF-INCRIMINATION BY SHIFTING THE BURDEN OF PROOF AT SENTENCING.**

A criminal defendant has a constitutional privilege against self-incrimination. U.S. Const. Amend. V; U.S. Const. Amend. XIV. This includes a constitutional right to remain silent pending sentencing. *In re Detention of Post*, 145 Wn.App. 728, 758, 187 P.3d 803 (2008) (citing *Mitchell v. United States*, 526 U.S. 314, 325, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999) and *Estelle v. Smith*, 451 U.S. 454, 462-63, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)). A sentencing court may not draw adverse inferences from an offender's silence pending sentencing. *Mitchell*, at 328-329.

Thus, for example, it is improper to imply lack of remorse from an accused person's presentencing silence. *Post*, at 758.

The state does not meet its burden to establish an offender's criminal history through "bare assertions, unsupported by evidence." *State v. Ford*, 137 Wn.2d 472, 482, 973 P.2d 452 (1999). An offender's "failure to object to such assertions [does not] relieve the State of its evidentiary obligations." *Ford* at 482. This rule is constitutionally based, and thus cannot be altered by statute; as the Supreme Court pointed out, requiring the offender to object when the state presents no evidence "would result in an unconstitutional shifting of the burden of proof to the defendant." *Ford*, at 482.

In 2008, the legislature amended RCW 9.94A.500 and RCW 9.94A.530. *See* Laws of 2008, Chapter 231, Section 2. Under RCW 9.94A.500(1), "[a] criminal history summary relating to the defendant from the prosecuting authority... shall be prima facie evidence of the existence and validity of the convictions listed therein." RCW 9.94A.500(1). Furthermore, the sentencing court may rely on information that is "acknowledged in a trial or at the time of sentencing," and

“[a]cknowledgment includes... not objecting to criminal history presented at the time of sentencing.” RCW 9.94A.530(2).<sup>6</sup>

These provisions result in the “unconstitutional shifting of the burden of proof to the defendant.” *Ford*, at 482. By requiring an offender to object to a prosecutor’s allegations, RCW 9.94A.500(1) and RCW 9.94A.530(2) violate the Fifth and Fourteenth Amendments to the U.S. Constitution. *Ford, supra*.

Here, the prosecutor failed to present any evidence that Mr. Bell had criminal history or was on community custody at the time of the offense. Instead, the prosecutor submitted a document captioned “Prosecutor’s Statement of Criminal History,” which listed three adult felonies and nine juvenile felonies. Prosecutor’s Statement of Criminal History, Supp. CP. The prosecutor also submitted scoring sheets indicating that Mr. Bell was on community custody at the time of the current offenses. *See* Offender Scoring Sheets, Prosecutor’s Statement of Criminal History, Supp. CP. Mr. Bell acknowledged (during trial) that he’d been convicted of a prior forgery, and he arguably acknowledged the other two convictions for which he was sentenced in 2005. RP (7/13/09)

---

<sup>6</sup> Under the prior version of the statute, a Statement of Prosecuting Attorney was insufficient to establish an offender’s criminal history. *State v. Mendoza*, 165 Wn.2d 913, 205 P.3d 113 (2009).

79. At sentencing, his attorney acknowledged that Mr. Bell had a prior (juvenile) sex offense. RP (7/16/09) 6.

Under these circumstances, Mr. Bell should have been sentenced with an offender score of no more than 4 on the each charge. Instead, however, the trial judge adopted the prosecutor's assertions and sentenced Mr. Bell with an offender score of 12 (on Count I) and 8 (on Count II).<sup>7</sup> CP 12. By accepting the prosecutor's statement, the court relied on "bare assertions" of criminal history in violation of *Ford, supra*. Because the prosecutor failed to prove Mr. Bell's criminal history, the sentence must be vacated and the case remanded for sentencing with an offender score of four. *Ford, supra*.

### **CONCLUSION**

For the foregoing reasons, Mr. Bell's convictions must be vacated and the case remanded for a new trial. In the alternative, the sentence must be vacated and the case remanded for resentencing with an offender score of four.

Respectfully submitted on November 18, 2009.

---

<sup>7</sup> The trial judge did not indicate that Mr. Bell was on community custody at the time of the current offenses, but nonetheless used 8 and 12 as the offender scores. CP 18-19.

**BACKLUND AND MISTRY**

Handwritten signature of Jodi R. Backlund in cursive script, written over a horizontal line.

Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

Handwritten signature of Marek R. Mistry in cursive script, written over a horizontal line.

Marek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

FILED  
COURT OF APPEALS  
DIVISION II  
OCT 19 10 PM 2:12  
STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Jeremiah Bell, DOC #878421  
Clallam Bay Corrections Center  
1830 Eagle Crest Way  
Clallam Bay, WA 98326

and to:

Thurston County Prosecutor's Office  
2000 Lakeridge Dr SW Bldg 2  
Olympia WA 98502-6045

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on November 18, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 18, 2009.

*[Signature]*  
\_\_\_\_\_  
Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant